

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
ACS of Fairbanks, Inc.	)	DA 02-1853
Petition for Declaratory Ruling	)	
and Other Relief Pursuant to Section 254(e)	)	
of the Communications Act	)	

**COMMENTS  
of the  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT  
OF SMALL TELECOMMUNICATIONS COMPANIES**

**I. INTRODUCTION**

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Commission's Public Notice<sup>1</sup> seeking comment on the Petition for Declaratory Ruling and Other Relief filed by ACS of Fairbanks, Inc (ACS). OPASTCO is a national trade association representing over 500 small telecommunications carriers serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 2.5 million customers. All of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. §153(37). In addition, they are all eligible telecommunications carriers (ETCs).

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on ACS of Fairbanks, Inc. Petition for Declaratory Ruling and Other Relief*, CC Docket 96-45, Public Notice, DA 02-1853 (rel. Aug. 1, 2002).

In its Petition, ACS has convincingly demonstrated that when a competitive eligible telecommunications carrier's (CETC's) loop costs knowingly fall below the Commission's high-cost standard, providing the CETC with incumbent local exchange carrier (ILEC)-based universal service support gives the competitor a windfall of unneeded support that violates Section 254(e) of the Telecommunications Act of 1996 (the Act). OPASTCO concurs with ACS that, in order to put a halt to this occurrence, the Commission must declare that when a CETC leases unbundled network element (UNE) loops at known and documented prices, high-cost loop support should be based on the CETC's per-line UNE-based costs, rather than on the actual costs of the ILEC.

## **II. COMMENTS**

In comments previously filed in CC Docket No. 96-45, OPASTCO stated that there is no basis upon which to presume that CETCs and ILECs have the same costs or that granting identical universal service fund (USF) support will provide each ETC with "sufficient" but not excessive support.<sup>2</sup> The costs of ILECs and CETCs will almost always vary and, to the extent that a CETC receives loop support based on different, higher ILEC costs, then the CETC receives funds that exceed its own universal service costs, in violation of Section 254(e).<sup>3</sup> ACS describes a situation within its Petition that is a perfect example of excessive USF support knowingly being granted to a CETC.

In the situation identified by ACS, General Communications, Inc. (GCI), a

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<sup>2</sup> See, OPASTCO and NRTA Comments, CC Docket No. 96-45, FCC 01-157 (fil. July 30, 2001), p. 6.

<sup>3</sup> *Ibid.*, p. 5.

CETC serving Fairbanks, Alaska, leases its loops as UNEs from ACS at the state-mandated monthly price of \$19.19 per loop.<sup>4</sup> This price is below the \$23.00 threshold for receiving high-cost loop support.<sup>5</sup> Nevertheless, under current Commission rules, GCI is able to receive the same per-line support received by ACS, based on ACS' actual average monthly cost per loop of \$33.51.<sup>6</sup> Therefore, the loop support GCI receives is pure windfall.

The fact that a carrier such as GCI can receive high-cost loop support (HCLS) when its UNE-based loop costs are below the HCLS eligibility threshold, is a clear violation of Section 254(e) of the Act. Section 254(e) states that “[a] carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”<sup>7</sup> ACS correctly points out that if a CETC's loop costs do not reach the level required for HCLS, then it “cannot be using the HCLS it receives for the purpose for which it was intended – to support high-cost loops.”<sup>8</sup>

In addition, ACS correctly argues that:

“[the] payment of high-cost funds to CETCs that do not have high-cost loops gives these CETCs a huge competitive advantage, which allows them the flexibility either to earn super-competitive profits or to gain market share by offering services at prices that would be unsustainable in the absence of this subsidy.”<sup>9</sup>

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<sup>4</sup> ACS of Fairbanks, Inc., CC Docket No. 96-45, Petition for Declaratory Ruling and Other Relief (fil. July 24, 2002), p. 3 (ACS Petition).

<sup>5</sup> ACS Petition, p. 8.

<sup>6</sup> *Ibid.*, p. 9.

<sup>7</sup> 47 U.S.C. § 254 (e).

<sup>8</sup> ACS Petition, p. i.

<sup>9</sup> *Ibid.*, p. ii.

This sort of opening for regulatory arbitrage is at odds with the Commission's own universal service principle of competitive neutrality. Moreover, it invites uneconomic competition in high-cost, rural areas that is contrary to the public interest. As ACS states, "the current rules fail to promote efficient competition, but instead allow for inefficient carriers to enter the market and compete based on these unlawful subsidies."<sup>10</sup> Finally, such a situation unnecessarily burdens the nation's ratepayers who are the ultimate contributors to the universal service fund.

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<sup>10</sup> *Id.*, p. 5. Commissioner Kevin Martin has also expressed concern with universal service support being used as a means to create "competition" in high-cost areas. Commissioner Martin noted that he was "hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may [...] lead to inefficient and/or stranded investment and a ballooning universal service fund." See, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Second Report and Order and Further Notice of Proposed Rulemaking*, Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19613, 19770.

### **III. CONCLUSION**

When a CETC leases UNE loops at clearly identifiable rates, there is absolutely no reason why that carrier's support levels should not be based on its own UNE-based loop costs. So doing would improve compliance with Section 254(e) of the Act. It would also be competitively neutral, thereby promoting the proper economic incentives for seeking ETC designation and entering high-cost areas. Finally, basing CETCs' support on their own UNE-based costs will prevent unnecessary ratepayer burden and curb the potential excessive growth of the high-cost fund.

Respectfully submitted,

**THE ORGANIZATION FOR THE  
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September 3, 2002

## **CERTIFICATE OF SERVICE**

I, Jeffrey W. Smith, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent by first class United States mail, postage prepaid, on this, the 3<sup>rd</sup> day of September, 2002, to those listed on the attached list.

By: /s/ Jeffrey W. Smith  
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